

§ 134.502

rules of this subpart explain which OHA proceedings are covered, who may be eligible for an award of fees and expenses, and how to apply for such an award.

§ 134.502 Under what circumstances may I apply for reimbursement?

You may apply for reimbursement under this subpart if you meet the eligibility requirements in §134.406 and you prevail over SBA in a final decision in:

- (a) The type of administrative proceeding which qualifies as an “adversary adjudication” under §134.403; or
- (b) An ancillary or subsidiary issue in that administrative proceeding that is sufficiently significant and discrete to merit treatment as a separate unit; or
- (c) A matter which the agency orders to be determined as an “adversary adjudication” under 5 U.S.C. 554.

§ 134.503 What is an adversary adjudication?

For purposes of this subpart, adversary adjudications are administrative proceedings before OHA which involve SBA as a party and which are required to be conducted by an Administrative Law Judge (“ALJ”). These adjudications (“administrative proceedings”) include those proceedings listed in §134.102 (a), (i), and (j)(1), but do not include other OHA proceedings such as those listed in §134.102(k). In order for an administrative proceeding to qualify, SBA must have been represented by counsel or by another representative who enters an appearance and participates in the proceeding.

§ 134.504 What benefits may I claim?

You may seek reimbursement for certain reasonable fees and expenses incurred in prosecuting or defending a claim in an administrative proceeding.

§ 134.505 Under what circumstances are fees and expenses reimbursable?

- (a) If you are a prevailing eligible party, you may receive an award for reasonable fees and expenses unless the position of the agency in the proceeding is found by the ALJ to be “sub-

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stantially justified”, or special circumstances exist which make an award unjust. The “position of the agency” includes not only the position taken by SBA in the administrative proceeding, but also the position which it took in the action which led to the administrative proceeding. No presumption arises that SBA’s position was not substantially justified simply because it did not prevail in a proceeding. However, upon your assertion that the position of SBA was not substantially justified, SBA will be required to establish that its position was reasonable in fact and law.

- (b) The ALJ may reduce or deny an award for reimbursement if you have unreasonably protracted the administrative proceeding or if other special circumstances would make the award unjust.

(c) Awards for fees and expenses incurred before the date on which an administrative proceeding was initiated are allowable only if you can demonstrate that they were reasonably incurred in preparation for the proceeding.

§ 134.506 Who is eligible for possible reimbursement?

- (a) You are eligible for possible reimbursement if:

(1) You are an individual, owner of an unincorporated business, partnership, corporation, association, organization, or unit of local government; and

(2) You are a party, as defined in 5 U.S.C. 551(3); and

(3) You are the prevailing party; and

(4) You meet certain net worth and employee eligibility requirements set forth in §134.407.

- (b) You are not eligible for possible reimbursement if you participated in the administrative proceeding only on behalf of persons or entities that are ineligible.

§ 134.507 How do I know which eligibility requirement applies to me?

Follow this chart to determine your eligibility. You should calculate your net worth and the number of your employees as of the date the administrative proceeding was initiated.

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If your participation in the proceeding was:	Eligibility requirements:
(1) As an individual rather than a business owner	(1) Personal net worth may not exceed 2 million dollars.
(2) As owner of an unincorporated business	(2) Personal net worth may not exceed 7 million dollars, and No more than 500 employees.
(3) As a partnership, corporation, association, organization, or unit of local government.	(3) Business net worth may not exceed 7 million dollars, and No more than 500 employees.
(4) As a charitable or other tax-exempt organization described in 26 U.S.C. 501(c)(3) or a cooperative association as defined in 12 U.S.C. 1141j(a).	(4) No net worth limitations, and No more than 500 employees.

§ 134.508 What are the special rules for calculating net worth and number of employees?

(a) Your net worth must include the value of any assets disposed of for the purpose of meeting an eligibility standard, and must exclude any obligation incurred for that purpose. Transfers of assets, or obligations incurred, for less than reasonably equivalent value will be presumed to have been made for the purpose of meeting an eligibility standard.

(b) If you are an owner of an unincorporated business, or a partnership, corporation, association, organization, or unit of local government, your net worth must include the net worth of all of your affiliates. "Affiliates" are:

(1) Corporations or other business entities which directly or indirectly own or control a majority of the voting shares or other ownership interests in the applicant concern; and

(2) Corporations or other business entities in which the applicant concern directly or indirectly owns or controls a majority of the voting shares or other ownership interests.

(c) Your employees include all those persons regularly working for you at the time the administrative proceeding was initiated, whether or not they were at work on that date. Part-time employees must be included on a proportional basis. You must include the employees of all your affiliates in your total number of employees.

§ 134.509 What is the difference between a fee and an expense?

A fee is a charge to you for the professional services of attorneys, agents, or expert witnesses rendered in connection with your case. An expense is the cost to you of any study, analysis, engineering report, test, project, or similar matter prepared in connection with your case.

§ 134.510 Are there limitations on reimbursement for fees and expenses?

(a) Awards will be calculated on the basis of fees and expenses actually incurred. If services were provided by one or more of your employees, or were made available to you free, you may not seek an award for those services. If services were provided at a reduced rate, fees and expenses will be calculated at that reduced rate.

(b) In determining the reasonableness of the fees for attorneys, agents or expert witnesses, the ALJ will consider at least the following:

(1) That provider's customary fee for like services;

(2) The prevailing rate for similar services in the community in which that provider ordinarily performs services;

(3) The time actually spent in representing you; and

(4) The time reasonably spent in light of the difficulty and complexity of the issues.

(c) An award for the fees of an attorney or agent may not exceed \$75 per hour, and an award for the fees of an expert witness may not exceed \$25 per hour, regardless of the rate charged.

(d) An award for the reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on your behalf may not exceed the prevailing rate payable for similar services, and you may be reimbursed only if the study or other matter was necessary to the preparation of your case.

§ 134.511 What should I include in my application for an award?

(a) Your application must be in the form of a written petition which is served and filed in accordance with § 134.204. It must contain the following information: